LE COPY

NOV 3 1972

in the

Supreme Court

of the

United States

OCTOBER TERM, 1972

NO. 72-561

FLORIDA VANDERBILT DEVELOPMENT CORPORATION, an Ohio Corporation, formerly known as FLORIDA REALTY CO., and HAROLD J. BAKER. Individually,

Petitioners,

vs

CHANDLER LEASING DIVISION, PEPSICO SERVICE INDUSTRIES LEASING CORPORATION, a Delaware corporation,

Respondent.

Brief in Opposition to Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

HERBERT STETTIN
FRIEDMAN, BRITTON & STETTIN
Attorneys for Respondent
Suite 800, First National Bank Building
Miami, Florida 33131

INDEX

Page

OPINIONS BELOW 2

JURISDICTION 2

STATEMENT OF FACTS 2

STATEMENT OF THE CASE 3

REASONS FOR DENYING PETITIONER'S WRIT OF CERTIORARI 7

CONCLUSION 13

CERTIFICATE OF SERVICE 14

APPENDIX ..... App. 1

CITATIONS

Page

Alachua Inn Corp. v. Cooper,
235 So. 2d 312, D.C.A. Fla., 1st Dist. (1970) 11

Cutler Gate Building Corp. v. United States Leasing Corp.,
165 So. 2d 207, D.C.A. Fla., 3rd Dist. (1964) 12

Geiger Mutual Agency, Inc. v. Wright
233 So. 2d 444, D.C.A. Fla., 4th Dist. (1970) ... 11, 12

Hyman v. Cohen
73 So. 2d 393, S. Ct. Fla. (1954) 10, 11

Monsalvatge & Co. of Miami, Inc. v. Ryder Leasing, Inc.,
151 So. 2d 453, D.C.A. Fla., 3rd Dist. (1963) 12

Stuco Corp. v. Gates,
145 So. 2d 527, D.C.A. Fla., 2d Dist. (1962) 11

28 U.S.C., §1254(1) 2,7

9 Fla. Jur., Damages, §§ 103-113 9

20 Fla. Jur., Landlord-Tenant, §§ 80-83 9

in the
Supreme Court
of the
United States

OCTOBER TERM, 1972

NO. _____

FLORIDA VANDERBILT DEVELOPMENT CORPORATION, an Ohio Corporation, formerly known as FLORIDA REALTY CO., and HAROLD J. BAKER, individually,

Petitioners,

vs.

CHANDLER LEASING DIVISION, PEPSICO SERVICE INDUSTRIES LEASING CORPORATION, a Delaware corporation,

Respondent.

Brief in Opposition to
Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

Comes now the Respondent, through the undersigned counsel, and files this Brief in Opposition to Petitioner's Petition for Writ of Certiorari in the above-captioned case, pursuant to Rule 24 of the Supreme Court's Rules, Revised and Amended, 1971.

OPINIONS BELOW

The Order of the District Court below, granting the Respondent's Motion for Summary Judgment, is unreported to date, and appears in Appendix C, infra. The Summary Final Judgment, entered by the District Court below, granting the Respondent money damages for breach of contract, is likewise unreported and appears in Appendix B, infra. The Opinion of the Court of Appeals for the Fifth Circuit, affirming in part, reversing in part, and remanding to the District Court, is not yet reported and appears in Appendix A, infra.

JURISDICTION

The jurisdiction of this Court has been invoked by Petitioner under 28 U.S.C., §1254(1). Petitioner's Petition for Writ of Certiorari, p. 2. The jurisdiction of this Court is challenged by Respondent pursuant to Rule 24 (2) of the Supreme Court's Rules, Revised and Amended, 1971.

STATEMENT OF FACTS

The material facts involved in this litigation are not in dispute. On the 23rd day of January, 1970, the Respondent (the initial Plaintiff) and the Petitioner (the initial Defendant) entered into a lease agreement, the performance of which was guaranteed by an individual named HAROLD J. BAKER, one of the initial Defendants.

This lease agreement contemplated the lease of a certain 1970 Cris Craft Commander by the Petitioner for a period of nine (9) years. The rent to be paid by the lessee, for the use of this Cris Craft for the first sixty-six (66) months, was at the rate of $4,314.99 per month. Thereafter, rent was to be paid on a yearly basis of $13,626.29.

The Petitioner made payments on said lease agreement until September 1, 1970. No payment was made for the month of October, 1970. On or about that date the Petitioner wrote to the Respondent and advised the Respondent that it was terminating the lease agreement.

On September 17, 1970, the Petitioner deposited the vessel with a marina in Fort Lauderdale, where it remained until February 11, 1971. On the 11th day of February, 1971, the Respondent was granted possession of the vessel by virtue of a Final Judgment of Replevin entered in the Circuit Court of Broward County, Florida.

On April 19, 1971, after having given notice to the Petitioner, the Respondent conducted a public sale of the vessel and the vessel was sold for the sum of $100,000.00. Demand was made upon the Petitioner for payment of the monies. This suit then followed.

STATEMENT OF THE CASE

On May 24, 1971, the Respondent sued the Petitioner in the United States District Court for the Southern District of Florida. The Complaint alleged a breach of the lease contract by the Petitioners, and sought to recover damages in accordance with express contractual provisions set out in §14 of said contract.[1]

[1]That clause provides in pertinent part, that in the event of termination of the contract due to a breach of same by the lessee:

> "... lessee shall also be liable to lessor for a further sum, computed separately as to each category ("A", "B" and "C" below) of terminated equipment returned to or repossessed by lessor: (A) As to any terminated equipment sold by lessor before the expiration of the initial term, the sum of (1) an amount equal to fifteen per cent of the actual

Under this formula for damages, outlined in §14 of the lease agreement, Respondent could recover damages consisting of the remaining rental payments due during the unexpired term of the lease, minus the proceeds received from the sale of the vessel.

The Petitioner's Answer contained the following defenses. First, Petitioner alleged that the Respondent's (the lessor) vessel was not seaworthy, and therefore, Respondent breached some warranty of seaworthiness, deemed by Petitioner (the lessee) to be implied in the lease agreement. The District Court denied Petitioner's defense of breach of warranty of seaworthiness because (1) the instant Complaint involved a non-maritime action for damages arising under a land-based lease agreement, and therefore, no warranty of

---

cost to the lessor of such equipment plus (2) the "balance of rent", being the unpaid balance (if any) of the total rent reserved herein attributable to such equipment for the portion of the initial term unexpired at the time of such termination ("unexpired Term"), less (3) the net proceeds of such sale. (B) As to any terminated equipment re-let by lessor during the unexpired term, an amount equal to such balance of rent less the net rental proceeds from such re-letting attributable to such unexpired term. (C) As to any terminated equipment which lessor, after having made efforts reasonable in the circumstances, is unable during the unexpired term to sell or to re-let on a reasonable basis, an amount equal to such balance of rent. As to any terminated equipment not returned to or repossessed by lessor, in addition to remaining liable for the return thereof as above provided, lessee shall notwithstanding such termination also be liable to lessor for such balance of rent. Since pursuant to the foregoing lessor may receive payment of such balance of rent at a time or times earlier or later than the same would have fallen due in the absence of termination, such balance of rent is to be adjusted by subtracting discount therefrom or adding interest thereto accordingly, at the rate of 6% per annum, and for the purposes of computing such adjustments, the aforesaid proceeds of sale or re-letting and any sums received from lessee in respect of said termination and of all costs and expenses incurred by lessor hereinbelow mentioned, and thereafter, to the payment of the balance of rent . . ."

seaworthiness could possibly be implied in the lease agreement as a matter of law; (2) the Respondent expressly disclaimed *all* warranties in Section 3 of the lease agreement.[2]

Second, the Petitioner alleged that by Respondent's retaking of the vessel, the Respondent had elected its sole remedy for damages, and was therefore precluded from seeking additional rental payments after surrender or repossession of the vessel. With regard to this defense, the District Court held that Florida law limited the Respondent's damages to the rents accrued in default until the time of surrender or repossession, plus interest, costs, and attorneys' fees.

The Respondent filed its Notice of Appeal with the Fifth Circuit Court of Appeals on January 11, 1972, and the Petitioner cross-appealed on January 19, 1972. The Fifth Circuit Court of Appeals rendered its decision on July 18, 1972.

With respect to the breach of warranty issue, the Court of Appeals rejected Petitioner's claim that any warranty of seaworthiness could be implied from the lease agreement because the Petitioner actually selected the vessel in question, and, in addition, even selected the boat company from which the vessel was to be ordered. As a result, the Court of Appeals deemed Respondent a mere financing agent, rather

---

[2] "3. **WARRANTY.** Lessor, without assuming responsibility for compliance by supplier, will request the supplier to authorize lessee to enforce in lessee's own name all warranties, agreements, or representations, if any, which may be made by the supplier to lessee (or lessor). **LESSOR ITSELF MAKES NO EXPRESSED OR IMPLIED WARRANTIES OR REPRESENTATIONS AS TO ANY MATTER WHATSOEVER, INCLUDING, WITHOUT LIMITATIONS, THE CONDITIONS OF EQUIPMENT, ITS MERCHANTABILITY OR ITS FITNESS FOR ANY PARTICULAR PURPOSE.** In no event shall any defect in or unfitness of the equipment relieve lessee of the obligation hereunder, once the item has been accepted, or presumed accepted under Paragraph 1 hereof, by lessee."

than a "demise charterer,"[3] and thus found Respondent not liable under Petitioner's warranty claims. Moreover, the Court of Appeals rejected Petitioner's breach of warranty claims under the express contractual disclaimer clause in the lease agreement itself. See footnote No. 2 herein.

With regard to the issue of damages, the Court of Appeals held that the parties could be bound legally by the damage provisions contracted for, even after the repossession and subsequent resale of the vessel.[4] Moreover, the Court of Appeals expressly stated that to limit the defaulting party's liability to the amount in default under the lease *at the time* of repossession, as a matter of law, would *"place an intolerable burden"* upon the lessor, as lessees could breach agreements with impunity and only be held liable for the payment in default at time of repossession.[5]

In rendering its decision on damages, the Court of Appeals expressly analyzed Florida cases cited by Petitioner, which limited damages for default to the time of repossession. However, the Court of Appeals carefully distinguished those cases on their facts from those facts in the instant case. These distinctions are clearly set out in the Court of Appeals Opinion. See Appendix A, Court of Appeals Opinion, pp. 5-9.

---

[3]A "demise charterer" could, under certain circumstances, not present herein, be held liable for breach of some warranty of seaworthiness.

[4]After repossession, the vessel was resold for $100,000.00, which amount was deducted from the damages prayed for by Respondent, pursuant to the express default provisions of the contract set forth in footnote 1 of this Brief.

[5]The Court of Appeals did, however, strike as a penalty the contractual provision that the Petitioner be required to pay 15% of the actual cost of the equipment, a provision outlined in the lease agreement. See footnote 1 of this Brief, Page 3.

REASONS FOR DENYING PETITIONER'S WRIT OF CERTIORARI

A. PETITIONER'S WRIT OF CERTIORARI, ON ITS FACE, DOES NOT MERIT THIS COURT'S EXERCISE OF JURISDICTION

Petitioner's Writ of Certiorari, on its face, does not merit this Court's exercise of jurisdiction. This is simply because every one of Petitioner's "Questions Presented for Review" does not conform to any of the Court's jurisdictional standards which govern review on certiorari.[6]

According to Rule 19 of the Supreme Court's Rules, there are seven (7) basic standards which generally govern the Court's discretionary power to review cases pursuant to 28 U.S.C., §1254 (1). These seven (7) basic considerations are as follows:

(1) Where a state court has decided a Federal question of substance not before determined by the Supreme Court, or has decided it in a fashion contrary to decisions of the Supreme Court;

(2) Where a Federal court of appeals has rendered a decision which is in conflict with the decision of another Federal court of appeals on the same matter;

(3) Where a Federal court of appeals has decided an important question of Federal law which

[6]Compare Petitioner's "Questions Presented for Review", Petition for Writ of Certiorari, pp. 2, 3, with Rule 19 of the Supreme Court's Rules, Revised and Amended, 1971.

has not been settled, but should be settled by the Supreme Court;

(4) Where a Federal court of appeals has decided a Federal question in a fashion which is in conflict with applicable decisions of the Supreme Court;

(5) Where a Federal court of appeals has greatly departed from the accepted and usual course of general judicial proceedings;

(6) Where a Federal court of appeals has sanctioned a lower court's paramount departure from the usual course of general judicial proceedings;

(7) Where a Federal court of appeals has decided an important state or territorial question in a fashion which conflicts with applicable state or territorial law.[7]

Hence, Petitioner's "Questions Presented for Review", on their face, do not address themselves at all to the first six (6) discretionary standards, outlined above.

With respect to the seventh (7th) discretionary standard, the undersigned fail to see how the subject of a *mere lease of personal property* can be deemed an *important state or territorial question*. Therefore, Petitioner's claim that the Court of Appeals Opinion conflicts with appropriate state law would seem irrelevant, and, accordingly, not worthy of this Court's attention.

---

[7] Counsel for Respondent contend, here, that although these seven (7) standards do not fully measure the Court's discretionary power, they are guidelines which are generally followed, absent unusual circumstances.

REASONS FOR DENYING PETITIONER'S WRIT OF CERTIORARI

A. PETITIONER'S WRIT OF CERTIORARI, ON ITS FACE, DOES NOT MERIT THIS COURT'S EXERCISE OF JURISDICTION

Petitioner's Writ of Certiorari, on its face, does not merit this Court's exercise of jurisdiction. This is simply because every one of Petitioner's "Questions Presented for Review" does not conform to any of the Court's jurisdictional standards which govern review on certiorari.[6]

According to Rule 19 of the Supreme Court's Rules, there are seven (7) basic standards which generally govern the Court's discretionary power to review cases pursuant to 28 U.S.C., §1254 (1). These seven (7) basic considerations are as follows:

(1) Where a state court has decided a Federal question of substance not before determined by the Supreme Court, or has decided it in a fashion contrary to decisions of the Supreme Court;

(2) Where a Federal court of appeals has rendered a decision which is in conflict with the decision of another Federal court of appeals on the same matter;

(3) Where a Federal court of appeals has decided an important question of Federal law which

[6]Compare Petitioner's "Questions Presented for Review", Petition for Writ of Certiorari, pp. 2, 3, with Rule 19 of the Supreme Court's Rules, Revised and Amended, 1971.

has not been settled, but should be settled by the Supreme Court;

(4) Where a Federal court of appeals has decided a Federal question in a fashion which is in conflict with applicable decisions of the Supreme Court;

(5) Where a Federal court of appeals has greatly departed from the accepted and usual course of general judicial proceedings;

(6) Where a Federal court of appeals has sanctioned a lower court's paramount departure from the usual course of general judicial proceedings;

(7) Where a Federal court of appeals has decided an important state or territorial question in a fashion which conflicts with applicable state or territorial law.[7]

Hence, Petitioner's "Questions Presented for Review", on their face, do not address themselves at all to the first six (6) discretionary standards, outlined above.

With respect to the seventh (7th) discretionary standard, the undersigned fail to see how the subject of a *mere lease of personal property* can be deemed an *important state or territorial question*. Therefore, Petitioner's claim that the Court of Appeals Opinion conflicts with appropriate state law would seem irrelevant, and, accordingly, not worthy of this Court's attention.

---

[7] Counsel for Respondent contend, here, that although these seven (7) standards do not fully measure the Court's discretionary power, they are guidelines which are generally followed, absent unusual circumstances.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT IN
AND FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

NO. 71-831-Civ-EC

CHANDLER LEASING DIVISION, PEPSICO SERVICE INDUSTRIES LEASING CORPORATION, a Delaware corporation,

Plaintiff,

vs.

FLORIDA-VANDERBILT DEVELOPMENT CORPORATION, an Ohio corporation, formerly known as FLORIDA REALTY CO., and HAROLD J. BAKER, individually,

Defendants.

[Filed Dec. 21, 1971]

SUMMARY FINAL JUDGMENT

THIS CAUSE came on to be heard upon the plaintiff's Motion for Summary Judgment, and this Court, on the 17th day of November, 1971, having entered its Order thereon and having determined that there is no genuine issue as to any material fact and that the plaintiff is entitled to a Summary Judgment as a matter of law, it is thereupon

ORDERED and ADJUDGED that plaintiff's Motion for Summary Judgment be and the same is hereby granted, and that the plaintiff, CHANDLER LEASING DIVISION, PEPSICO SERVICE INDUSTRIES LEASING CORPORATION, a Delaware corporation, do have and recover of and from the defendants, FLORIDA-VANDERBILT DEVELOPMENT CORPORATION, an Ohio corporation, formerly known as FLORIDA REALTY CO., and HAROLD J. BAKER, individually, the sum of $23,270.05 principal, together with interest at the rate of six per cent (6%) per annum from February 11, 1971 in the sum of $1,097.64, making a total of $24,367.69, a reasonable attorneys' fee in the sum of $3000.00, and costs to be hereinafter taxed, for all of which let execution issue.

ENTERED at Miami, Florida, this 20th day of November, 1971.

Emett C. Choate

U.S. DISTRICT JUDGE

B. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH APPLICABLE STATE LAW

Assuming, however, for purposes of argument, that the instant lease agreement is an important state or territorial question on its face – as claimed by Petitioner – the undersigned contend that the Court of Appeals decision herein affirms applicable state law, rather than departs from it.[8]

The pertinent law of Florida is generally set forth in *9 Fla. Jur., Damages,* §§ 103-113. Section 103 reads as follows:

> "The parties to a contract may fix in advance the amount which shall be paid in compensation for loss or injury which may result in the event of a breach of the agreement, and the courts will give effect to such provisions, at least when, under the circumstances, the provision is reasonable, the damages are in their nature uncertain, and it is apparent that it was the intention of the parties to in fact provide for liquidated damages and not for a penalty. Indeed, in some instances, as in marketing agreements, liquidated damages are authorized by statute.
>
> The purpose in permitting a stipulation for damages as compensation is to render certain and definite that which appears to be uncertain and not easily susceptible of proof."

Florida law pertaining to liquidated damages is applicable to leases in the State of Florida as set forth in *20 Fla. Jur., Landlord-Tenant,* §§ 80-83. The leading Florida case on

---

[8]See Appendix A, Court of Appeals Opinion, pp. 5-9.

liquidated damages is *Hyman v. Cohen,* 73 So. 2d 393, S.Ct. Fla. (1954). In *Hyman* the lease was one involving real property for a five-year term, calling for an annual rental of $25,000.00. Under the terms and conditions of the lease, a $25,000.00 deposit was made which was denominated in the lease as a cash bond guaranteeing performance of all the covenants of the lease. The lease provided for forfeiture of the deposit in the event the lease was cancelled for default by the lessee. Upon the lessee's failure to pay one of the annual rental payments, the lessor demanded surrender of the premises, and the lessee tendered possession of the premises.

In holding that the Plaintiff was nonetheless entitled to recover damages, the Florida Supreme Court stated:

> "In the application of the foregoing principles to lease contracts, many courts have held that a breach of the material parts of the covenants of a lease, accompanied or followed by a renunciation of the whole lease, gives rise to a cause of action for the recovery of damages as for a total breach of a contract. See *Sagamore Corporation* v. *Willcutt,* 120 Conn. 315, 180 A.464; *Bradbury* v. *Higginson,* 162 Cal. 602, 123 P. 797; *Hawkinson* v. *Johnston,* 8 Cir., 122 F. 2d 724, 137 A.L.R. 420; *Marathon Oil Co.* v. *Edwards,* Tex. Civ. App., 96 S.W. 2d 551; *Lips* v *Opp,* 150 Kan. 745, 96 P. 2d 865.
>
> "And even in those jurisdictions which do not apply the foregoing principles of contract law to lease agreements, it is recognized that the parties may expressly contract *for the survival of liability on the part of the tenant after a premature termination* of the lease by the lessor for the default of the lessee. See Rasch, on *Landlord and Tenant,* 1950 Ed., page 591; 32 Am. Jur., *Landlord and Tenant,* Sec 876,

page 743; *Burns Trading Co.* v. *Welborn,* 10 Cir., 81 F. 2d 691, 196 A.L.R. 285." (Emphasis added) 73 So. 2d at pp. 397, 398.

As in *Hyman v. Cohen,* supra, it is certainly clear from a careful reading of the lease involved in the instant case that the parties intended that there should be a "survival of liability" on the part of the lessee, eventhough the vessel might be repossessed. The instant lease provides several methods of computing damages upon a wrongful breach, one of which is for the lessor to sell the chattel and apply the proceeds of the sale against those rentals that would accrue in the future.

Analysis of *Hyman v. Cohen* would indicate, therefore, that the Florida courts do *not* preclude a claim for damages arising from the anticipatory breach of a lease contract, but rather *approve* same. See also, *Stuco Corp. v. Gates,* 145 So. 2d 527, D.C.A. Fla., 2d Dist. (1962); *Alachua Inn Corp. v. Cooper,* 235 So. 2d 312, D.C.A. Fla., 1st Dist. (1970).

Petitioner claims that the Court of Appeals award of damages to Respondent[9] is contrary to Florida law. Petitioner bases his argument, here, on the principle that once a lessor of personal property repossesses the property in question, he forfeits his legal right to money damages owed under the unexpired term of the lease agreement *after* repossession, *as a matter of law.* The theory of Petitioner's position, here, is that it would be inequitable to allow the lessor to repossess the property *for his benefit,* and, at the same time, be awarded all rental payments due under the duration of the lease agreement. *Geiger Mutual Agency, Inc. v. Wright,* 233

[9]The Court of Appeals decision allowed Respondent to recover all rental payments due in accordance with the lease contract, minus the proceeds which Respondent received from the sale of the vessel. See Appendix A, Court of Appeals Opinion, pp. 5-9.

So. 2d 444, D.C.A. Fla., 4th Dist. (1970); *Monsalvatge & Co. of Miami, Inc. v. Ryder Leasing, Inc.*, 151 So. 2d 453, D.C.A. Fla., 3rd Dist. (1963); *Cutler Gate Building Corp. v. United States Leasing Corp.*, 165 So. 2d 207, D.C.A. Fla., 3rd Dist. (1964).

However, the general theory prohibiting an inequitable double recovery after repossession by the lessor, as noted in the *Geiger, Monsalvatge,* and *Cutler* decisions, supra, is not applicable in the instant case because of one very basic fact: *Respondent did not use nor benefit from his repossession of the vessel.* Respondent's repossession of the vessel at issue was followed almost immediately by Respondent's sale of that vessel, the proceeds of which were deducted from the total rent due under the lease agreement.[10]

Hence, Respondent's repossession of the vessel was not for the benefit of the Respondent, but rather for the ultimate benefit of the Petitioner.

In view of the foregoing facts, it is difficult to see how the Court of Appeals award of damages was inappropriate, as Petitioner contends. The Respondent had never, and does not now, take the position that it is entitled to recover lease payments that would accrue *after termination of the lease* between the parties. For such a position, we concede, would be contrary to Florida law.

We do submit, however, that Respondent was entitled to recover damages determined by the method of computation set forth in §14 of the lease agreement itself. Moreover, it is important to note that both the District Court and Court of Appeals Opinions failed to find that the method of deter-

[10]Said procedure was followed in accordance with the express provisions in §14 of the lease agreement. See footnote No. 1 of this Brief, page 3.

mining these damages was (1) unreasonable, or (2) bore no relationship to the actual damages that might have been suffered by the Respondent under the lease agreement.

The undersigned submit, therefore that the Court of Appeals award of damages is not only equitable, but also clearly sanctioned by Florida law as set forth above.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that Petitioner's Petition for Writ of Certiorari be dismissed.

Respectfully submitted,

FRIEDMAN, BRITTON & STETTIN
Attorneys for Respondent

By _____
JOHN L. BRITTON

By _____
MICHAEL A. POHL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed to HELLIWELL, MELROSE & DeWOLF, Esqs., Attorneys for Petitioners, 600 Brickell Avenue, Miami, Florida 33131, this _____day of October, 1972.

_____
Of Counsel for Respondent

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-1383
Summary Calendar*

CHANDLER LEASING DIVISION,
PEPSICO SERVICE INDUSTRIES LEASING
CORPORATION,
Plaintiff-Appelant-Cross Appellee,

versus

FLORIDA-VANDERBILT DEVELOPMENT
CORPORATION, formerly known as FLORIDA REALTY
CO., and HAROLD J. BAKER, individually,
Defendants-Appellees-Cross-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

(July 18, 1972)

Before BELL, DYER and CLARK,
Circuit Judges.

---

*Rule 18, 5th Cir., see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of N. Y.*, 431 F.2d 409, Part I (5th Cir. 1970).

CLARK, Circuit Judge: This appeal by plaintiff, Chandler Leasing Division of Pepsico Service Industries Leasing Corporation (Chandler), and cross-appeal by defendant, Florida-Vanderbilt Development Corporation (Florida-Vanderbilt), involves the validity of the defense of breach of warranty of seaworthiness and the proper measure of damages for an admitted breach of a written lease agreement covering a 55 foot yacht. The facts are not in dispute, but the admiralty and Florida legal conclusions to be derived therefrom are contested.

On January 23, 1970, Chandler leased to Florida-Vanderbilt a 1970 Chris Craft Cruiser for a nine-year term. On September 1, Florida-Vanderbilt ceased remitting payments and on October 30 wrote to Chandler terminating the lease because of acute electrolysis problems. Pursuant to a judgment of replevin issued by a Florida state court, Chandler repossessed the vessel on February 11, 1971, proceeded to hold a public sale of the vessel (which is not attacked procedurally) and purchased the vessel at that sale for 100,000 dollars.

Chandler filed this suit seeking a recovery of damages in accordance with the provisions of the lease contract which essentially consisted of the discounted value of all future rent payments less the purchase price of 100,000 dollars. Florida-Vanderbilt defended by claiming a breach of the warranty of seaworthiness. The district court refused to recognize the seaworthiness defense but entered summary judgment which limited Chandler's recovery to the accrued rental in default as of February 11.

Florida-Vanderbilt cross-appeals from the district court's disallowance of its affirmative defense that Chandler breached

its warranty of seaworthiness. Florida-Vanderbilt argues that a warranty of seaworthiness attached to the lease agreement despite the existence of a general, but universal, disclaimer clause.[1] It contends that the disclaimer in order to be efficacious against a warranty of seaworthiness, must specifically state that the warranty is abjured. The facts in the case at bar make this defense wholly inapplicable. Chandler was not a boat owner offering to lease a vessel. The lease makes it transparently clear that Florida-Vanderbilt chose the exact yacht and equipment it wanted and even selected the boat company from which it wanted the yacht to be acquired. The very first term of the lease provided:

> "EQUIPMENT; ACCEPTANCE. Lessee hereby leases from lessor, and lessor leaves to lessee, the personal property described above and in any schedule made a part hereof by the parties hereto (herein called 'equipment'). Lessee has chosen and requested equipment of the type and quantity specified herein and has selected the supplier named above. Lessor agrees to order such equipment from said supplier, but shall not be liable in any event for specific performance of this lease or for damages of any type, if, with or without excuse, the supplier delays or fails

[1] "3: WARRANTY. Lessor, without assuming responsibility for compliance by supplier, will request the supplier to authorize lessee to enforce in lessee's own name all warranties, agreements, or representations, if any, which may be made by the supplier to lessee (or lessor). LESSOR ITSELF MAKES NO EXPRESSED OR IMPLIED WARRANTIES OR REPRESENTATIONS AS TO ANY MATTER WHATSOEVER, INCLUDING, WITHOUT LIMITATIONS, THE CONDITIONS OF EQUIPMENT, ITS MERCHANTABILITY OR ITS FITNESS FOR ANY PARTICULAR PURPOSE. In no event shall any defect in or unfitness of the equipment relieve lessee of the obligation hereunder, once the item has been accepted, or presumed accepted under Paragraph 1 hereof, by lessee."

> to fill the order or delivery of the equipment is otherwise delayed or not made. Any delay in such delivery shall not affect the validity of this lease. Lessee shall accept such equipment if delivered in good repair, and hereby authorizes lessor to insert herein the serial number of each item of equipment so delivered. Unless lessee gives lessor written notice of each defect or other proper objection to any item of equipment within five (5) business days after receipt thereof, it shall be conclusively presumed, as between lessee and lessor, that the item was delivered in good repair and that lessee accepts it as an item of equipment described herein."

No principle of the maritime doctrine of warranty of seaworthiness, which applies to demise charters and related vessel leases, proscribes Chandler from contracting with Florida-Vanderbilt that a part of the consideration for the lease of a vessel Florida-Vanderbilt selected and caused Chandler to purchase should include a waiver of any warranty from Chandler. In substance, Chandler was not a demise charterer but rather was a financing agent. Under the facts here, the general disclaimer clause effectively remitted any claim arising from the leased vessel's physical condition to such claim as could be exerted against the manufacturer's warranties. The district court correctly struck the affirmative defense of breach of warranty of seaworthiness.

Florida-Vanderbilt attempts to also cast its defense in a failure of consideration mold. We similarly reject this attempt to reach the same result via a substitute route. The leased vessel it picked out was accepted and used, and rentals were remitted for many months. The obligations of the lease were fully assumed and cannot be negated in derogation of the document's plain terms.

Chandler argues that according to Subsection (A) of Section 14 of the lease agreement[2] it is entitled to: (i) 15% of the actual cost of the vessel, + (ii) the balance of the rent for the unexpired term of the lease from the date of termination minus the 100,000 dollars received from the sale, both adjusted by the required discounts or added interest, + (iii) expenses and attorneys' fees. Florida-Vanderbilt relies upon Cutler Gate Building Corp. v. United States Leasing Corp., 165 So.2d 207 (Fla. Dist. Ct. of Appeal, 3d Dist. 1964); Monsalvatge & Co. v. Ryder Leasing, Inc., 151 So.2d 453 (Fla. Dist. Ct. of Appeal, 3d Dist. 1963) to uphold the district court's judgment that such recovery would be inequitable and unjust.

---

[2] 14. DEFAULT. If lessee, fails to pay any rent or other amount herein provided within ten (10) days after the same is due and payable . . . lessor at its option may from time to time sue, at law or in equity, to enforce performance of this lease or to recover damages for breach thereof, or, may by notice in writing to the lessee terminate this lease as to any or all items of equipment; . . . In the event of such notice of termination from the lessor, this lease shall terminate in accordance therewith as to the equipment specified ("terminated equipment") but the lessee shall nevertheless remain liable for all rents therefore and additional sums thereon accrued and unpaid at the time of termination and additionally shall be liable to lessor as hereinafter provided. In such event lessee shall remain liable for the return of the terminated equipment to lessor, as provided in paragraph 7 hereof, but lessor may take possession of any or all of said equipment, wherever it may be located without demand or notice, without any court order of process of law, and without incurring any liability to lessee for any damages occasioned by such taking of possession. Lessor shall make such efforts as are reasonable in the circumstances, at its option either to sell any or all of the terminated equipment at public or private cash or credit sale, or to re-let the same. In the event of such termination, lessee shall also be liable to lessor for a further sum, computed . . .: (A) As to any terminated equipment sold by lessor before the expiration of the initial term, the sum of (1) an amount equal to fifteen per cent of the actual cost to the lessor of such equipment, plus (2) the "balance of rent", being the unpaid balance (if any) of the total rent reserved herein attributable to such equipment for the portion of the initial term unexpired at the time of such termination ("unexpired term"), less (3) the net proceeds of such sale . . . Since pursuant to the foregoing lessor may receive payment of such balance of rent at a time or times earlier or later than the same would have fallen due in the absence of termination, such balance of rent is to be adjusted by subtracting

Except for one particular – the requirement of an arbitrary payment of 15% of actual cost – the provisions of the present lease are distinguishable from Cutler Gate and Monsalvatge. The contractual clauses involved in both of those cases provided for damage in the amount of the unaccrued rents for the remainder of the lease term and in addition, the lessor was allowed the use and benefit of the leased property. The Florida courts held that it would be unjust and inequitable to allow the lessor this much compensation because in effect the lessor was afforded a double remedy. See also Geiger Mutual Agency, Inc. v. Wright, 233 So. 2d 444 Fla. Dist. Ct. of Appeal, 4th Dist. 1970). Instead, the recovery was limited to the rentals in default at the time of the termination of the lease.

These cases cannot be interpreted to lay down the per se rule that irrespective of whatever contractual damage provision the parties may have agreed upon, only rentals in default could be recovered. Such a rule would not only conflict with the right of contracting parties to obligate themselves as they wish, but it would also be inconsonant with sound reason. Under so absolute a rule, lessees could breach lease agreements with impunity knowing that they would be liable only for the payments in default, and lessors on the other hand would never know when the property would be returned and

---

discount therefrom or adding interest thereto accordingly, at the rate of 6% per annum, and for the purposes of computing such adjustments, the aforesaid proceeds of sale or re-letting and any sums received from lessee in respect of said termination and of all costs and expenses incurred by lessor hereinbelow mentioned, and thereafter, to the payment of the balance of rent. In addition to the foregoing, lessor may recover from lessee all costs and expenses, including without limitation, reasonable attorneys' fees and fees of collection agencies, incurred by lessor in exercising any of the rights or remedies, such costs and expenses to include, without limitation, in case of termination any and all incurred in taking or receiving possession, removal, storing, selling or re-letting the terminated equipment in reconditioning the same for selling or re-letting, and in repairing and restoring the same to the conditions stated in paragraph 7 hereof"

in what condition. Such intolerable conditions would so seriously impair the commercial viability and efficacy of lease transactions that they would forestall or inhibit the negotiation of commercially valuable lease agreements.

However, the absolute requirement of Section 14 that a defaulting lessee pay 15% of the actual cost of the equipment leased can, in the context of the other damage covenants, only amount to an unenforceable attempt to contract for a penalty in excess of actual damages. It is not a liquidated damage clause. The damages were certainly capable of accurate estimation, if by no other means, then by the contractual process of selling the property let, applying sale proceeds to reduce the anticipated rental income and providing for the reimbursement of all retaking and selling expense. The percentage remained inflexible throughout the years of the lease and in no part served as a reasonable forecast of just compensation, which is the hallmark for legal damages under Florida law. Pembrooke v. Caudill, 160 Fla. 948, 37 So.2d 538, 6 ALR2d 1395 (1948); Hungerford Const. Co. v. Florida Citrus Exposition, 410 F.2d 1229, cert. denied 396 U.S. 928 (1969); 1 Restatement of Contracts §339(1) (1932). For example, consider how unconscionable such a flat exaction would be in the latter months of the lease.

Florida follows the universal rule that parties sui juris may negotiate any contract not violative of law or public policy. See e.g., International Ass'n of Machinists v. State ex. rel. Watson, 15 So.2d 485 (Fla. en banc 1943); Troup v. Mayer, 116 So.2d 467 (Fla. Dist. Ct. of Appeal, 3d Dist. 1959); 17 C.J.S. Contracts §1(2) (1963). Except for the flat 15% of cost proviso, the present contractual method of damage calculation is not violative of any law or public policy. It does not provide for a double recovery as did the contracts in Cutler Gate and Monsalvatge. With the 15% penalty deleted, it is a reasonable damage

provision that competent contracting parties were completely free to negotiate about and accept or reject.

We recognize that under the Florida case law there are three remedies available to lessors when their lessees breach a lease agreement.[3] However, these remedies are not established as the sole remedies which may be provided for lease breaches, but are intended to supply remedies when none are provided in the lease or when broader contractual lease remedies violate public policy. Since we conclude that without the 15% penalty Section 14 neither provides the lessor with a double remedy nor violates any announced public policy of the State of Florida, it is controlling on the question of damages. Therefore the district court erred in refusing to apply the remedy of that subsection to the breach admitted here.

Under Section 14 the termination date is crucial to the computation of damages. We construe that date to be February 11, 1971, the date the lessor first took an affirmative act indicating its choice of remedies under the provisions of the contract.

---

[3]The three remedies are:

"(a) he may treat the lease as terminated and resume possession of the premises, thereafter using the same exclusively as his own for his own purposes; or

"(b) he may retake possession of the premises for the account of the tenant, holding the tenant in general damages for the difference between the rentals stipulated to be paid and what, in good faith, the landlord is able to recover from a reletting; or

"(c) he may stand by and do nothing, and sue the lessee as each installment of rent matures, or for the whole when it becomes due." 4 Adkins, Florida Real Estate Law and Procedure 106.04 at p. 1970 (1960). See also Kanter v. Safran, Fla. 1953, 68 So.2d 553, 557-558; Diehl v. Gibbs, Fla.App. 1965, 173 So.2d 719, 720.

Jimmy Hall's Morningside Inc. v. Blackburn & Peter Enterprises, Inc., 235 So.2d 344 (Fla. Dist. Ct. of Appeal, 2d Dist. 1970). See also Hyman v. Cohen, 73 So. 2d 393 (Fla. en banc 1954).

In view of our disposition of this case, we pretermit discussion on Florida-Vanderbilt's final point. The cause is remanded to the district court for a calculation of damages due Chandler under Section 14.

AFFIRMED in part, REVERSED in part, and REMANDED with directions.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT IN
AND FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

NO. 71-831-Civ-EC

CHANDLER LEASING DIVISION, PEPSICO SERVICE INDUSTRIES LEASING CORPORATION, a Delaware corporation,

Plaintiff,

vs.

FLORIDA-VANDERBILT DEVELOPMENT CORPORATION, an Ohio corporation, formerly known as FLORIDA REALTY CO., and HAROLD J. BAKER, individually,

Defendants.

[Filed Dec. 21, 1971]

SUMMARY FINAL JUDGMENT

THIS CAUSE came on to be heard upon the plaintiff's Motion for Summary Judgment, and this Court, on the 17th day of November, 1971, having entered its Order thereon and having determined that there is no genuine issue as to any material fact and that the plaintiff is entitled to a Summary Judgment as a matter of law, it is thereupon

ORDERED and ADJUDGED that plaintiff's Motion for Summary Judgment be and the same is hereby granted, and that the plaintiff, CHANDLER LEASING DIVISION, PEPSICO SERVICE INDUSTRIES LEASING CORPORATION, a Delaware corporation, do have and recover of and from the defendants, FLORIDA-VANDERBILT DEVELOPMENT CORPORATION, an Ohio corporation, formerly known as FLORIDA REALTY CO., and HAROLD J. BAKER, individually, the sum of $23,270.05 principal, together with interest at the rate of six per cent (6%) per annum from February 11, 1971 in the sum of $1,097.64, making a total of $24,367.69, a reasonable attorneys' fee in the sum of $3000.00, and costs to be hereinafter taxed, for all of which let execution issue.

ENTERED at Miami, Florida, this 20th day of November, 1971.

Emett C. Choate

U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT IN
AND FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

NO. 71-831-Civ-EC

CHANDLER LEASING DIVISION, PEPSICO
SERVICE INDUSTRIES LEASING CORPORATION,
a Delaware corporation,

Plaintiff,

vs.

FLORIDA-VANDERBILT DEVELOPMENT CORPORATION,
an Ohio corporation, formerly known as FLORIDA
REALTY CO., and HAROLD J. BAKER, individually,

Defendants.

[Filed Jan. 3, 1972]

ORDER AMENDING JUDGMENT

THIS CAUSE came on before the Court sua sponte, and it appearing to the Court that the Summary Final Judgment entered herein is dated the 20th day of November, 1971 when in truth and in fact said Summary Final Judgment should be dated the 20th day of December, 1971, it is thereupon

ORDERED and ADJUDGED that said Summary Final Judgment be and the same is hereby amended to the extent that it is dated the 20th day of December, 1971, all other terms and conditions of said Judgment to remain in full force and effect.

ENTERED at Miami, Florida, this 3rd day of January, 1972.

/s/ Emett C. Choate

SENIOR U.S. DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 71-831-Civ-TC

CHANDLER LEASING DIVISION, PEPSICO SERVICE INDUSTRIES LEASING CORPORATION,

Plaintiff,

v.

FLORIDA-VANDERBILT DEVELOPMENT CORPORATION, etc., and HAROLD J. BAKER,

Defendants.

[Filed Nov. 17, 1971]

ORDER

This cause came before the court upon the motion of the plaintiff, Chandler Leasing Division, Pepsico Service Industries Leasing Corporation, for summary judgment as to both liability and damages. Upon consideration of the pleadings and memoranda of law, the court finds that defendants' affirmative defenses of breach of warranty of seaworthiness and failure of consideration are without merit and inapplicable to the instant litigation. On September 3, 1971, the court ordered that the defendants' affirmative defense of breach of warranty of fitness

for a particular purpose be stricken from the second amended answer since paragraph 3 of the lease agreement constituted a valid disclaimer of all warranties under Florida Statutes §672.2-316. Defendants' response to plaintiff's motion for summary judgment attempts unsuccessfully to circumvent the warranty disclaimer by raising the affirmative defense of breach of warranty of seaworthiness, allegedly separate and distinct from the warranty of fitness for a particular purpose. The court is unable to find and the defendants have yet to present any authority for the use of the doctrine of seaworthiness in the context of this suit. The maritime doctrine of seaworthiness is a theory of liability without fault whereby a shipowner is held strictly responsible for personal injury or property damage resulting from his vessel being in an unseaworthy condition, and such doctrine is inappropriate as a defense to a non-maritime complaint for damages arising from the default in the payments due under a land-based leasing agreement. The defendants' companion affirmative defense of failure of consideration also does not hold water. The defendant did receive what it bargained for – the designated 55-foot Chris Craft vessel, not warranted to be fit for a particular purpose. The transaction was at arm's length.

According to *Cutler Gate Building Corp. v. United States Leasing Corp.*, Fla. 3 Dist. 1964, 165 So.2d 207, and *Monsalvatge & Co. of Miami, Inc., v. Ryder Leasing, Inc.*, Fla. 3 Dist. 1963, 151 So. 2d 453, the plaintiff is entitled to damages for defendant's default equivalent to the rents accrued and in default at the time of surrender or repossession of the leased equipment, together with interest, costs, and attorney's fees. Section (A) of paragraph 14 of the lease would render the defendant-lessee liable for rental payments for the full term of the lease (less the resale price), even though the lessor repossessed the vessel prior to the expiration of the lease, and, in addition, the lessee would be obligated to pay a penalty totalling 15% of the actual cost to the lessor of the leased

equipment. Such a stipulated damage provision is contrary to the established law in Florida, as expressed above, and totally antagonistic to the judicial concept of "just compensation." Consequently, the plaintiff may recover damages from the defendants equalling the lease payments in default from September 1, 1970, until February 11, 1971, plus interest, costs, and reasonable attorney's fees. It is accordingly,

ORDERED and ADJUDGED that the plaintiff's motion for summary judgment is granted, and plaintiff shall submit to the court for entry, with copy to opposing counsel, a proposed final judgment within five days of the entry of this order. Defendants shall then have three days to respond to plaintiff's proposed judgment.

DONE and ORDERED at Miami, Florida, this 17th day of November, 1971.

TED CABOT

UNITED STATES DISTRICT JUDGE

Copies to counsel.